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If International Law is Not International, What Comes Next? On Anthea Roberts' Is International Law International?

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**IF INTERNATIONAL LAW IS NOT INTERNATIONAL,
WHAT COMES NEXT? ON ANTHEA ROBERTS, *IS
INTERNATIONAL LAW INTERNATIONAL?***

REBECCA INGBER*

I am thrilled that the editors of the *Boston University Law Review* have chosen to review Anthea Roberts' recent book, *Is International Law International?*,¹ for their annual symposium. In order to answer the title's question, Roberts develops a research project to scrutinize a world she knows well: the field of teaching international law, her colleagues, and their students. The result is a rigorous disaggregation of the multifarious ways that international law is taught across the globe, thus demonstrating the lack of universality in the study of international law.

Roberts situates herself within a line of scholars who have met with some resistance in calling attention to what David Kennedy calls the "pluralism" of international law.² Yet since Roberts embarked on this groundbreaking project, several others have taken up the call to arms to consider this "divisibility," as she terms it. Roberts herself—with Paul Stephan, Pierre-Hugues Verdier, and Mila Versteeg—has edited a volume on comparative international law, with contributions produced for a conference on the burgeoning field.³ And *Is International Law International?* has met with significant acclaim, winning the American Society of International Law's book prize for its contribution to creative scholarship.⁴ So it may not be clear to the current reader, therefore, just how controversial Roberts' project had the potential to be. Yet the significance of international law—and states' compliance with it—relies in large part on an understanding of international law as universal, hence the resistance felt by scholars who challenge it, and that is the very assumption that Roberts tackles head on in her book.

Roberts' work, therefore, in challenging the universality of international law could risk being viewed, or even deployed, as a means of challenging the entire enterprise. That is not her purpose, but neither does the risk deter her from taking

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¹ ANTHEA ROBERTS, *IS INTERNATIONAL LAW INTERNATIONAL?* (2017).

² See e.g., David Kennedy, *One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream*, 31 N.Y.U. REV. L. & SOC. CHANGE 641, 641-42 (2007).

³ COMPARATIVE INTERNATIONAL LAW (Anthea Roberts et al., eds. 2018).

⁴ *Awards and Honors: 2018 Certificate of Merit Winners*, AM. SOC'Y OF INT'L LAW, <https://www.asil.org/about/awards-and-honors> [<https://perma.cc/77JB-KTP7>] (last visited Mar. 15, 2019).

on the question. And in fact she reflects candidly in her conclusion on the many such questions that her project leaves unanswered.

My sense is that the book will leave many international law scholars as it leaves me, with much food for thought on two levels: how does this project affect our scholarship, and how does it affect our teaching? I will briefly touch on both here in turn.

HOW DOES THE DIVERSITY IN THE STUDY OF INTERNATIONAL LAW SHAPE STATES' LEGAL POSITIONS?

It is well-understood that states take different positions on doctrinal questions of international law. Scholars have long debated why this is so and the extent to which such differences are merely pretext covering for political interests. I have explored how diversity *within* a state—and more specifically, within one component of a state, specifically the United States executive branch—influences the legal position that the state takes at either the domestic or international level. In a piece titled *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, I considered how “interpretation catalysts”—a term I use to identify distinct triggers impelling the government to formulate a legal position, such as the filing of a lawsuit or a treaty body reporting requirement—shape the process of decisionmaking inside the government and ultimately the resulting legal position.⁵ Now consider that this richness within the state is multiplied across states. How does the multiplicity in the international law academy, which Roberts well demonstrates, interact with the positions that states themselves ultimately take as the primary actors and creators of international law? How these interpretation catalysts trigger distinct pathways for decisionmaking comparatively, across states, winding toward distinct legal positions, is ripe for exploration.

Roberts gives us additional grist for the mill. She demonstrates that, at least at the academic level, students of international law may be taught not only different doctrinal rules but also to prioritize entirely different sources of law. Some of the questions that beckon, then, include: How do divergences in the academic study of international law affect practice, and does that process of translation between study and practice *itself* differ across states? Who are the actors responsible for determining the state's position on matters of international law inside the state, where or how were they trained in international law, and how does the particular interpretation catalyst triggering the state's decisionmaking process interact with each of these questions?

⁵ Rebecca Ingber, *Interpretation Catalysts and Executive Branch Decisionmaking*, 38 YALE J. INT'L L. 359, 366-68 (2013).

TEACHING INTERNATIONAL LAW IN THE WAKE OF *IS INTERNATIONAL LAW INTERNATIONAL?*

One of the delights of Roberts' book is the personal touch she brings to the project. And scholars of international law cannot help, in turn, but have a personal response to it. As I hinted at the outset, *Is International Law International?* is also a book about teaching, or at least, as a teacher reading it, it is impossible not to reflect upon one's own practices and see oneself in the subjects of Roberts' project. How do we, as educators, conceive our role in teaching international law to the next generation in a way that confronts the parochialism Roberts describes and yet also prepares them for practice in what will often be a domestic setting? Perhaps more urgently, how do we confront skepticism about the legitimacy or efficacy of international law, much less inculcate a sense of import in state compliance with it, against a backdrop of knowledge that lays bare its lack of universality?

Having discussed this terrific work with Roberts at length when she was embarking on this project, at a time when I was myself transitioning from the practice of international law in the U.S. government to academia, Roberts' insights and research have shaped the way I have thought about teaching international law from the outset. As a U.S. academic in particular, one cannot grapple with Roberts' work and fail to be cognizant of her critique of the particularly domestic-focused way that international law is often taught in the United States.

And yet, when teaching a body of students who predominantly intend to practice within the U.S. legal system, I also consider it unavoidable—even essential—to not only prepare them with the building blocks and doctrine of international law as these might be analyzed by an international tribunal, but also to grapple with how these interact today with the U.S. domestic legal system. Considering how U.S. institutions approach international law is more, not less, critical at a time when international law often appears to be under siege in this country. Just this past fall, we faced a contentious battle for the Supreme Court where the least controversial thing about the new justice was the extraordinarily narrow role he sees for international law in U.S. courts. It has become nearly impossible for a U.S. President to get a treaty through the Senate advice and consent process. And there is a widespread lack of basic understanding within the U.S. legal community, much less society generally, about what international law is, or the U.S. role in making it.

Bearing all of this in mind, I devote a significant component of my course to the role of international law in the U.S. legal system. Yet I try to do so transparently, with an awareness of Roberts' critique of the parochial nature of academic treatments of international law, and an acknowledgement that this translation dynamic is taking place—to diverse degrees—all over the world. When we consider in class the range of state interpretations in, say, NATO's use of force in the Kosovo conflict, including decisions whether to provide a legal justification at all, we consider not only the merits of the doctrinal arguments

themselves, but also the diverse internal pressures and contexts in which each state arrives at its legal position.

But even as we explore in class the diversity of processes and interpretations within and among states, I also want to be cognizant of the role international law educators play in constructing a sense of universality and inculcating that sense in the next generation. This is a construct that has real importance; to the extent we view state compliance with some universal(ish) concept of legal obligation as important—and I do—this requires a belief in the possibility and existence of universality at some level, even as that universality may be imperfect.